

Case

Case concerning the critical date in judging the legality of a disposition and the best interests of an undocumented minor

(Tokyo District Court, January 22nd, 2010, Hanrei-jiho, no. 2088, pp. 70-83)

Keywords: the position of “Guidelines”, the best interests of a child, ICCPR, ICRC

[Facts]

Between 1964 and 1968, X_1 and X_2 , nationals of the Republic of Peru (hereinafter, Peru), illegally entered Japan respectively and then, with X_3 and X_4 , their children who were born in Japan, lived there. In 2007, the parents' illegal entry, as well as the undocumented status of all family members was uncovered. X_1 and X_2 were recognized as falling under Article 24(1) of the Immigration Control and Refugee Recognition Act (hereinafter, the Act), and X_3 and X_4 were recognized as falling under Article 24(7) of the Act. Although all family members respectively raised objections, in 2008 the director of Tokyo Regional Immigration Bureau (hereinafter, Y), whose authority was delegated to him by the Minister of Justice, determined that none of the objections were justified and issued to each of them written deportation orders. All family members (hereinafter, the Applicants) brought this case before the Tokyo District Court for rescission of Y's determinations and dispositions. Also, it was found after disposition that X_3 had a brain tumor.

[Judgment]

First, the Court notes that a decision as to whether special permission to stay may be granted to foreign nationals who are due to be deported depends on Y's broad discretion.

Moreover, for X_1 and X_2 , the circumstances of their entry and stay must have been malicious considering their illegal entry, stay and employment for such a long period and X_2 's suspended sentences (for violations of the Act and Penal Code (uttering of counterfeit signed official documents)). Furthermore, for X_4 (11 years old at the time of disposition), considering her long stay since her birth and her adaptability to Japan such as her high-quality fluent Japanese, she would be greatly influenced both mentally and physically by the change in her environment as a result of deportation, but such difficulty can be caused generally when children who have grown up abroad return to their own country. Also, she could be presumed to be flexible, pliant, and young enough at the time of disposition that she could well adapt to the environment in Peru. Therefore the Court cannot agree that Y's determinations and dispositions were illegal. For their claim that the determinations

and dispositions violate the ICRC, ICCPR and ICESCR, considering the state's discretion regarding entry of foreign nationals as recognized under international law and the presumption of those treaties on its discretion (Article 9(4) of ICRC and Article of 13 of ICCPR), the purposes of them will be considered for foreign nationals in Japan only within the system based on the Act. Therefore the Court cannot allow their claim.

However, for X₃ (14 years old at the time of disposition), considering his very strong attachment to Japan, inability to adapt to a changed environment and the fact that he is much less skilled in Spanish than in Japanese, he would be greatly affected, both mentally and physically, from the change of environment caused by deportation. Also, considering the size of his tumor and the timing of the start of symptoms, the tumor could be presumed to have already reached a certain size at disposition, and that it was found later. Moreover he needs to be under periodic observations after the removal of the tumor, but, considering the state of Peru's medical system, it is extremely doubtful that he could receive appropriate medical services there, and the "Guidelines on Special Permission to Stay in Japan" (which was under revision as at July 2009) laid down by the Immigration Bureau, the Ministry of Justice provides that in case where "the applicant requires treatment in Japan for a serious illness, disease, etc.", permission to stay should be considered. Thus the Court concludes that Y's determination and disposition were made without considering his disease, which should have been considered, and they were made beyond Y's discretion even if the discretion was broad. Therefore the Court allows his claim. Regarding the Applicants' claim that all family members except X₃ should have been granted permission to stay to respect the unity of the family, their separation would not be illegal since the ICRC allows the separation of the family resulting from deportation, since it would be reasonable to expect that X₃ would receive support from surrounding people in the local community and others and would be regarded as independent of his parents. Also, the circumstances of X₁'s and X₂'s stay were malicious. Therefore the Court cannot allow their claim.

(ARIMA Haruki)

A case in which entry for the purpose of distributing leaflets was regarded as a crime under the Penal Code

(Supreme Court, November 30th, 2009, Hanrei-jiho, no. 2090, pp. 149-52)

Keywords: trespassing, freedom of expression, distributing leaflets from door to door

[Facts]

The defendant (hereinafter, X) entered a private condominium (hereinafter, the condominium) to distribute some promotional leaflets for a political party (hereinafter, the

leaflets) from door to door. In the entrance hall of the condominium there were resident mailboxes, the counter of the building manager's room and bulletin boards each of which displayed two notices (hereinafter, the notices) in the name of the management association (hereinafter, the association) on which the following sentences were written: "Posting advertising flyers or brochures is prohibited." and "You may not enter the premises of this condominium to post brochures, sell goods, etc. Those who need to visit a certain unit to undertake technical work, collect bills, etc. may enter only after signing the 'entry/exit record book' at the counter." The council of the association decided that, for distribution of documents, only the official reports of Katsushika Ward would be allowed to be posted. X was prosecuted since his entry into some common areas such as passageways, which were farther into the building than the mailboxes, for the purpose of an act of political expression (hereinafter, the entry) could constitute a trespass on a residence without justifiable grounds (first sentence in Article 130 of the Penal Code¹).

The Tokyo District Court on August 28, 2006 held that the entry did not constitute a trespass without justifiable grounds for the following reason: the notices could be read to the effect that only commercial activities were prohibited, and thus it would not follow that there were effective measures to convey to visitors the wish to prohibit entry for distributing materials in the condominium. Therefore the Court declared X not guilty. The prosecutor appealed. The Tokyo High Court on December 11, 2007 held that the entry constituted a crime under Article 130 of the Penal Code since it was clear by reading the bills as a whole that not only distributing political leaflets into resident mailboxes but even entering the premises for the purposes of distribution was prohibited. X appealed to the Supreme Court.

[Judgment]

The Court denies X's appeal.

Considering the structure of the condominium, the management conditions, the circumstances of the entrance hall, the contents of the notices, and the purpose of the entry, it is clear that the entry goes against the wish of the association and that X recognized this. Also, since X entered the common areas in the condominium such as passageways, the violation of legal interest cannot be regarded as insignificant. Therefore, the Court concludes that the entry constitutes a crime under the Penal Code.

For the claim that prosecuting him for such crime could violate Article 21(1) of the Constitution², the Court approves some necessary and reasonable limits to that freedom in the interests of public welfare, even if distributing leaflets is protected as freedom of

1) A person who, without justifiable grounds, breaks into a residence of another person ... shall be punished by imprisonment with labor for not more than 3 years or a fine of not more than 100,000 yen.

2) Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.

expression, since the method of expression should not be something that wrongfully violates others' rights. In this case, conformity with the Constitution regarding punishment of the entry for distribution of materials without the consent of the association is at question, not conformity regarding punishment of the expression itself. It should be noted that the areas X entered were the common areas where residents live their private lives, not those where people would be free to enter and exit generally, and the entry without consent violated not only the association's right to maintain the condominium but also the peaceful life of the residents. Therefore the Court concludes that prosecuting him for such crime for the entry does not violate Article 21(1).

(ARIMA Haruki)